IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

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: **J U D G M E N T :**

[1] LADU LAL & ANR. VS. STATE OF RAJASTHAN

S.B. CRIMINAL APPEAL NO.634 OF 2005

[2] RADHEY SHYAM VS. STATE OF RAJASTHAN

S.B. CRIMINAL APPEAL NO.697 OF 2005

[3] BHOJA @ HEERA VS. STATE OF RAJASTHAN

S .B. CRIMINAL APPEAL NO .34 OF 2006
against the judgment dated 10.08.2005 passed by learned Special Judge, NDPS Act Cases, Bhilwara in Sessions Case No.16/05 (State Vs. Radhey Shyam & Others).

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DATE OF JUDGMENT : 13th April, 2007

PRESENT

HON'BLE MR.MANAK MOHTA, J.

Mr. Rakesh Arora]
Mr. Gopal Acharya] for the appellants.
Mr. Anil Kaviraj]
Mr. Narendra Moolchandani, Public Prosecutor.

BY THE COURT :

1. These appeals have been filed by the accused-appellants against the judgment dated 10.8.2005 passed by

learned Special Judge, NDPS Act Cases, Bhilwara whereby the appellants have been convicted and sentenced as under :-

Radhey Shyam
Under Section 8/15 (c) of N.D.P.S. Act – Ten years' rigorous imprisonment and a fine of Rs.1,00,000/- in default of payment of fine, to further undergo one year's rigorous imprisonment.

Ladu Lal
Under Section 8/15 (c) of N.D.P.S. Act – Ten years' rigorous imprisonment and a fine of Rs.1,00,000/- in default of payment of fine, to further undergo one year's rigorous imprisonment.

Bhoja @ Heera
Under Section 8/15 (c) of N.D.P.S. Act – Ten years' rigorous imprisonment and a fine of Rs.1,00,000/- in default of payment of fine, to further undergo one year's rigorous imprisonment.

Chhotu
Under Section 8/29 (a) of N.D.P.S. Act – Ten years' rigorous imprisonment and a fine of Rs.1,00,000/- in default of payment of fine, to further undergo one year's rigorous imprisonment.

2. The prosecution story, in nutshell, is to the effect that on 3.10.2003 in the night at 12:05 SHO, Police Station Pander Mahesh Singh (PW-12) alongwith the raid-party comprising of constables Ramkedar, Durga Lal (PW-15), Kedar Mal (PW-16) and Gopal Lal (PW-4) proceeded in a government jeep for conducting 'nakabandi' and went towards 'Dagaria Choraha'. At about 3:00 a.m., the police-party started from

'Dagaria Choraha' and went towards 'Kanjaro Ki Aamad Rafat' and it continued there. At 5:00 a.m. from the side of 'Falasia', a 'Commander jeep' was seen coming with its lights on, which was signalled to stop but the driver instead of stopping the vehicle, sped away the vehicle towards Shahpura-Jahajpur road. It was noticed with the help of lights of government jeep that one more person was sitting inside the jeep besides the driver. Thereafter, on suspicion, the 'Commander jeep' was chased and a little thereafter, the said vehicle was found struck in a pool of rainy water having mud. The driver and his companion were not found there as they fled away taking advantage of darkness and long-standing crops in the nearby fields. Constable-Gopal Lal was left behind to guard the 'commander jeep' and the SHO alongwith the raid-party went in search of the driver and his companion but could not trace them. On coming back, the 'commander jeep' was inspected, wherein a registration certificate in the name of Parmeshwar Lal and one release memo in the name of Firoz Beg driver were found to be of jeep No. RJ-06C-2369 and alongwith the jeep, nine filled up gunny bags of suspicious material were also found. Two persons of nearby fields, namely, Sampat Lal and Ranjeet Meena were called, they consented for acting as

'motbirs' and thereafter in their presence, search and seizure proceedings were undertaken at 7:00 a.m. On the middle-seat of commander jeep, three gunny bags and from the rear-seat six gunny bags were seen lying. All the gunny bags were opened in the presence of 'motbirs' witnesses, which on opening were found to be containing 'Poppy Straw'. Constable-Kedar Mal was sent for bringing weighing machine and weights etc. He brought weighing instrument. All the nine gunny bags were weighed, that came out to be 186.500 Kgs. Thereafter sample weighing 500 Grams each of Poppy Straw was taken out from each bag and sealed in a white cloth on the spot and the nine bags were marked “A” to “I”. Samples thereof were marked “A-I to I-A”. The documents relating to seizure proceedings i.e. furd Ex.P/29 and specimen seal memo (Ex.P/28) etc., were prepared and later on alongwith the seized 'Commander jeep' nine gunny bags containing Poppy Straw and the samples thereof were handed over to PW-3 Motilal-Incharge Malkhana of the Police Station, Pander and on report (Ex.P/23), a case under Section 8/15 of N.D.P.S. Act vide FIR No.103/03 (Ex.P/24) was registered.

3. During the course of investigation, statements of various witnesses were recorded. Radhey Shyam was found to be the driver at the time of incidence, therefore, he was arrested. At the instance of accused-Radhey Shyam and on his information (Ex.P/10) given under Section 27 of Evidence Act, verification of the house of Chhotu was undertaken, from where the contraband was alleged to be loaded at the instance of Ladhu Lal and Bhoja @ Heera. They were arrested. The house of Chhotu was identified by accused-Bhoja @ Heera on his information (Ex.P/16) under Section 27 of Evidence Act. The accused-Chhotu was also arrested. Thereafter, the Investigating Officer also collected one affidavit (Ex.P/3) submitted by the son of the vehicle owner-Parmeshwar. Samples were sent to Forensic Science Laboratory for analysis. After completion of usual investigation, challan was filed against the aforementioned accused persons under Section 8/15 read with 8/29 of N.D.P.S. Act and charges were framed accordingly, to which the accused pleaded not guilty and claimed trial.

4. Ultimately, the accused were put to trial. During trial, prosecution examined PW-1 Gopal, PW-2 Sharwan, PW-3

Moti Lal, PW-4 Gopal Lal, PW-5 Brahmprakash, PW-6 Madhu, PW-7 Shashikant, PW-8 Kesar Lal, PW-9 Parmeshwar Lal, PW-10 Ramendra Agarwal, PW-11 Ram Prasad Upadhyaya, PW-12 Mahesh Singh Charan, PW-13 Suva Lal, PW-14 Ashok Kumar, PW-15 Durga Lal, PW-16 Kedar Mal, PW-17 Bansi Lal, PW-18 Abhay Singh, PW-19 Dev Karan, PW-20 Ramji Lal and PW-21 Seya Ram witnesses in support of its case. Documents Ex.P/1 to Ex./41 were got exhibited. Thereafter, the statements of accused-appellants were recorded under Section 313 Cr. P.C. They denied the allegations levelled by the prosecution witnesses, however, they did not choose to lead any defence. Accused-Radhey Shyam while denying the allegations levelled against him stated that he was forced under the threat of knife by Ramendra and Shashikant advocate to sign on the stamp paper. He further stated that he has been falsely implicated in the case. No witness was examined in defence. During trial, certain documents viz., Ex.D/1 and Ex.D/2 were got exhibited.

5. At the conclusion of trial after hearing the parties, the learned Special Judge, NDPS Act Cases, Bhilwara found the prosecution case proved against the accused persons and vide his judgment and order dated 10.8.2005 proceeded to

convict and sentence them, as mentioned above. Being aggrieved by the aforesaid judgment, appeal No.634/05 was filed by Ladhu Lal and Chhotu, Appeal No.697/05 was filed by accused-Radhey Shyam and appeal No.34/06 was filed by Bhoja @ Heera, notices of these appeals were given to the State. All the appeals relate to one single judgment of conviction and sentence, thus, are being heard and decided together by a common judgment.

6. I have heard learned counsel for the appellants as well as the learned Public Prosecutor for State and have carefully gone through the record of the case.

7. During the course of arguments, learned counsel for the accused-appellants **Ladu Lal & Chhotu** with reference to Appeal No.634/05 submitted that the learned trial court has not properly appreciated and considered the evidence and material available on record and has recorded an erroneous finding of guilt, that is not sustainable and deserves to be quashed and set aside. It was contended that in this case, there is no incriminating evidence against these accused persons. Neither any recovery was made from them nor they

were present at the time of the alleged recovery. As per the prosecution story, the alleged recovery was made from one unclaimed jeep. It was further contended that the conviction of accused-appellants Ladu Lal and Chhotu is based only upon extra-judicial confession of co-accused Radhey Shyam, who is alleged to have made an affidavit (Ex.P/3) but that it not sustainable. Firstly, that cannot be said to be extra-judicial confession made by Radhey Shyam. Further, such alleged confession made by co-accused Radhey Shyam could not be read against these co-accused. Secondly, that has not been corroborated by any independent evidence. The name of accused-Chhotu has not been mentioned in affidavit (Ex.P/3). In this respect, it was urged that the statement of PW-9 Parmeshwar Lal (owner of the vehicle) and his son-PW10 Ramendra are not reliable. They are not trustworthy witnesses. Nothing has been recovered from Ladhu. The prosecution story is based on affidavit (Ex.P/3), which was produced during the course of investigation after one year of the incident by PW-10 Ramendra (the son of vehicle owner) and that was got prepared by him to save his father. This document is full of doubts and no reliance can be placed on it but the learned trial court has not given due attention towards this aspect. It was

also contended that the evidence of information given by co-accused Radhey Shyam under Section 27 Evidence Act is also not sustainable against the accused-appellant Chhotu. It was urged that the alleged facts disclosed by way of the information were already in the knowledge of the police, thus, the information is of no value. Secondly, the facts of information has not been proved. The independent witnesses, namely, PW-1 Gopal and PW-2 Sharwan have not supported the prosecution story. Neither any contraband material was found at Chhotu's house nor his exclusive possession over the said house was proved. Further, that the contraband articles were loaded from his possession, was also not proved. The evidence of Patwari and others are of no help. The learned counsel for the appellant also challenged the seizure proceedings and stated that no independent witness has been presented in court, though as per record, Sampat and Ranjeet were kept as motbir witnesses at the time of alleged recovery. It was also submitted that the prosecution has not been able to prove link evidence properly and, therefore, the prosecution story remains doubtful but the learned trial court has not considered these aspects. Thus, it was urged that no case under Section 8/15 of N.D.P.S. Act is made out against Ladhu

and under Section 8/29 of N.D.P.S. Act against Chhotu and, therefore, their conviction deserves to be set aside and the appeal may be allowed. The learned counsel for the accused-appellants placed reliance on (i) 2004(2) Cr. L.R. (Raj.) 1158 Hanuman Das Vs. Union of India (ii) 1998 Cr. L.R. (Raj.) 531 Basanti Lal Vs. State of Rajasthan, (iii) 1997 Cr. L.R. (Raj.) 668 Kaya Vs. State of Rajasthan (iv) 2001(1) R.Cr.D. 352 (Raj.) Kishan Lal Vs. State of Rajasthan (v) 1996 Cr. L.J. 506 (Allahabad High Court) Maharaj Deen Vs. State (vi) 2000 Crl. L. J. 4797 (M.P. High Court) Balkrishna Naik Vs. State of Madhya Pradesh (vii) 1967 AIR (Raj.) 98 Mst. Kistoori Vs. State of Rajasthan, (viii) 1995 Cr. L.J. 1762 Balbir Singh Vs. State of Orissa (ix) AIR 1995 (SC) 980 Shivappa Vs. State of Karnataka (x) 2001 Cr. L.J. 3770 Rajkumar Pandit Vs. State of Bihar, (xi) 2004(2) Cr.L.R. (Raj.) 1240 Surja Ram Vs. State of Rajasthan, (xii) 2003(2) R.Cr.D Baburam @ Aaidan Ram Vs. State of Rajasthan (xiii) 2004(2) R.C.C. 1010 Hari Ram Vs. State of Rajasthan (xiv) 2003(1) R.Cr.D.440 (Raj.) Balu Ram Vs. State of Rajasthan (xv) 2006(2) RLW 1452 Raju Munim Vs. State of Rajasthan, (xvi) 2004(2) R.C.C. 707 Krishan Lal Vs. State of Rajasthan (xvii) 2004(3) R.C.C. 1400 Surja Ram Vs. State of Rajasthan (xviii) 2006(2) RLW 1281 Ram Niwas

Vs. State of Rajasthan.

8. The learned counsel for the accused-appellant **Radhey Shyam** in relation to appeal No.697/05 submitted that the accused-appellant has been falsely implicated in this case. The prosecution case against the present appellant is that he was the driver of the said vehicle at the relevant time but it is not proved. It was stated that he was not identified by any person nor any recovery was made in his presence. It was urged that as per the prosecution story at the time of first inspection of 'commander jeep', a release memo of the said vehicle in the name of Firoz Beg-driver was found alongwith the Registration Certificate of the jeep. No investigation was made from Firoz Beg. It was contended that at the instance of the owner of vehicle, his son-Ramendra and Shashikant, advocate forcibly under threat obtained his signatures on a stamp-paper and later on that was produced by Ramendra (marked as Ex.P/3) to the Investigating Officer to save his father i.e. the owner of the vehicle. Only on the basis of the said affidavit (Ex.P/3) he has been roped in this case. It was also urged that there is no corroboration of the said affidavit (Ex.P/3) by independent witnesses and Ex.P/3 which is on a

stamp paper was purchased on 29.9.2003 before the alleged incident of 3.10.2003 and the matter was written and got attested by PW-10 Ramendra on 3.10.2003 at evening time i.e. after the incident with the connivance of Notary PW-5 Brahm Prakash and PW-7 Shashikant advocate and this affidavit was produced after a gap of one year i.e. on 9.10.2004 by the son of the owner of vehicle without explaining the gross delay of one year. The affidavit (Ex.P/3) was not produced by him. The evidence of these persons are not reliable. Thus, the prosecution story is false, doubtful and is not reliable. It was further contended that during trial, the prosecution agency itself did not rely on this affidavit (Ex.P/3). In this respect, learned Special Public Prosecutor on 26.7.2005 moved an application under Section 8/25 N.D.P.S. Act and under Section 319 Cr. P.C. before the learned trial court for impleading Parmeshwar Lal (jeep owner) as an accused in this case stating therein that the affidavit (Ex.P/3) has been prepared bogus by Ramendra to save his father i.e. the owner of the jeep. He drew my attention towards the said application dated 26.7.2005 presented by Special Public Prosecutor before the trial court and submitted that the prosecution itself has found that the affidavit (Ex.P/3) to be incorrect and false

but the learned trial court has relied over it. It was also submitted that the affidavit (Ex.P/3) is not proved by independent witnesses and no fair investigation was made in that respect. It was also contended that affidavit (Ex.P/3) was never signed voluntarily nor he ever made such statement. It was also contended that the affidavit (Ex.P/3) could not be taken as extra judicial confession on his part. The learned trial court has given much emphasis on the affidavit (Ex.P/3) and has made it the sole basis of conviction but it was submitted that the approach of learned trial court is not correct and the finding of guilt is required to be quashed and the appeal be allowed. Learned counsel for the appellant has also relied on the contentions raised and the authorities cited by other appellants and placed reliance on the following decisions : (i) 2004(2) Cr. L.R. (Raj.) 1240 Sanju Ram Vs. State of Rajasthan, (ii) 2004(2) Cr. L.R. (Raj.) 1247 Jasbir Singh Vs. Union of India, (iii) 2005(2) Cr. L.R. (Raj.) 1507 Jai Ram Vs. State of Rajasthan, (iv) 2005(2) Cr. L.R. (Raj.) 881 Chetan @ Chet Ram Vs. State of Rajasthan, (v) 2001 Cr. L.R. (Raj.) 810 Thana Ram Vs. State of Rajasthan and 2002(1) Cr. L.R. (Raj.) 299 Shankar Lal Vs. State of Rajasthan.

9. With reference to appeal No.34/06 filed by **Bhoja @ Heera**, the learned counsel for the appellant submitted that the prosecution has not been able to prove the case against him. He has been falsely implicated in the case. Neither the recovery has been made from him nor he was present at the time of recovery. It was also contended that nobody has identified him. The evidence of information was of no use, as the facts were already within the knowledge of the police. It was further contended that as per the prosecution story, it is alleged that the raid-party saw one person was sitting besides the driver of the jeep but during investigation without any basis two persons, namely, Bhoja and Ladhu have been projected as accused. They have wrongly been entangled in this case, therefore, the prosecution story becomes doubtful. It was also contended that the total case against the present appellant is based on the alleged extra-judicial confession made by co-accused. It was urged on the same line as it was contended on behalf of appellant-Ladhu Lal that extra-judicial confession of a co-accused cannot be read against co-accused and cannot be made the basis for conviction. The learned lower court has not properly appreciated the evidence and the material available on record. Thus, the finding is not tenable

and is liable to be quashed and set aside. It was prayed that the appeal may kindly be allowed. Learned counsel in support of his contentions has placed reliance on : (i) AIR 2002 SC 3343 Avtar Singh Vs. State of Punjab (ii) 2004(2) Cr. L.R. (Raj.) 1240 Surja Ram Vs. State of Rajasthan, (iii) 2004(2) R.C.C. 707 Krishan Lal Vs. State of Rajasthan (iv) 2003(2) R.Cr. D. 423 (Raj.) Baburam @ Aaidan Ram Vs. State of Rajasthan (v) 2004(2) R.C.C. 1010 Hariram Vs. State of Rajasthan (vi) 2004(3) R.C.C. 1130 Krishan Kumar Vs. State of Rajasthan (vii) 2003(1) R.Cr.D.440 (Raj.) Balu Ram Vs. State of Rajasthan (viii) 2006(2) RLW 1281 Ram Niwas Vs. State of Rajasthan and (ix) 2006(2) RLW 1452 Raju Munim Vs. State of Rajasthan.

10. On the contrary, learned Public Prosecutor refuted the contentions raised by the learned counsel for the appellants with regard to aforesaid appeals. It was further submitted that the prosecution has placed complete material before the court and charges against the accused persons have been proved by reliable evidence. It was also contended that the accused-Radhey Shyam has admitted in his statement recorded under Section 313 Cr. P.C. that the affidavit (Ex.P/3)

bears his signature. Further he has stated that his signature was obtained forcibly but neither he has made any report to the police in time nor he has produced any defence evidence in this respect. In his affidavit, he has clearly stated his role and that of other co-accused persons. The house of Chhotu was verified by him as per his information. The facts are corroborated by other evidence. He has made extra-judicial confession of his act and the acts of the other co-accused, that is corroborated by other evidence. Thus, the learned trial court has rightly relied upon. The prosecution has also proved the seizure proceedings as well as the other link evidence by reliable evidence. As per FSL report (Ex.P/18), the contraband poppy straw was having the constituents of opium and that was found recovered and loaded by the accused persons. Thus, the finding of guilt against the accused may be maintained and all the appeals be disallowed.

11. Before adverting the evidence and contentions, it would be proper to scan in brief the evidence produced by the prosecution to prove its case :

PW-1 Gopal and **PW-2 Sharwan** are the prosecution witnesses who were presented to support the fact that accused-Radhey Shyam made verification of the house of accused-Chhotu from where it is alleged to have loaded the contraband article. These witnesses were declared hostile and in the cross-examination made by Special Public Prosecutor they stated that they did not know Radhey Shyam and further stated that they had placed their signatures on Furd Moka Tasteek (Ex.P/1) under the pressure of police. Thus, these witnesses do not support the prosecution case.

PW-3 Moti Lal is the Incharge Malkhana of P.S. Pander. He has deposed that on 3.10.2003, the SHO deposited nine sealed bags containing Poppy Straw alongwith nine sealed packets of samples and Jeep No.RJ-06-2369 and he made an entry to that effect in the Malkhana Register (Ex.P/2) at Sr. No.123. On 8.10.2003 he handed-over the said samples marked “A-1” to “I-1” to constable-Kedar Mal for depositing them with FSL. Constable-Kedar Mal on 9.10.2003 submitted receipt of deposit of the sample vide Ex.P/40. In cross-examination this witness has stated that re-sealing with seal of police station was not done by him at the time of deposition of

articles. He has also admitted that the specimen seal was not deposited in 'Malkhana' alongwith the contraband article.

PW-4 Gopal Lal is the constable who accompanied the raid party. He has stated that one more person was seen sitting besides the driver of 'commander jeep'. The jeep driver did not stop the vehicle despite giving signal to stop and sped away on Shahpura-Jahahpur road and, as such, was chased. After a distance, the said jeep was found struck in a pool of muddy rain water and nobody was found inside the jeep. This witness says that both the persons fled away from scene, therefore, they could not be identified. He supported the seizure proceedings made by PW-12 Mahesh Singh.

PW-5 Brahm Prakash is the Notary-Public cum Advocate of Jahajpur civil court. He stated that on 3.10.2003 he attested the affidavit (Ex.P/3), which bears his signature as 'A' to 'B' and bears his seal 'X' to 'Y'. He further stated that the affidavit was drafted by Shashikant, Advocate and Radhey Shyam signed the affidavit at 'G' to 'H' in his presence. He has further stated that he was not knowing Radhey Shyam but was knowing Parmeshwar Lal. He further stated that Radhey Shyam was

identified by Ramendra-son of Parmeshwar Lal. He stated that this affidavit was got attested from him in the evening.

PW-6 Madhu is the formal witness of arrest memo of accused Ladhu (Ex.11A). This witness has turned hostile. He further stated that Ladhu was neither arrested in his presence nor any notice was given to him in his presence.

PW-7 Shashikant is an Advocate, who drafted the affidavit (Ex.P/3). He stated that the stamp-paper was purchased by Radhey Shyam and as per his instruction, on 3.10.2003 at evening time, the affidavit was drafted. Radhey Shyam was accompanied by Ramendra (jeep owner's son). The affidavit was attested by Notary-Brahm Prakash. The affidavit bears his signature 'C' to 'D'. He has denied the suggestion that the jeep was being driven by Parmeshwar and he in connivance with Parmeshwar had drafted a bogus affidavit stating Radhey Shyam to be the driver of the said jeep.

PW-8 Keshar Lal is the Stamp Vendor. As per his statement, Radhey Shyam purchased a stamp of Rs.20/- from him on

29.9.2003 for the purpose of marriage. He further stated that at that time Parmender was with him.

PW-9 Parmeshwar Lal is the registered owner of jeep No.RJ-06C-2369. Ex.P/5 is its Registration Certificate. He stated that on 22.9.2003 Radhey Shyam R/o. Pancha Ka Baada, Jahajpur was the driver of the aforesaid jeep. The jeep was being used as 'taxi'. He stated that he came to know that Ladu Jat and Bhoja Gurjar had taken the jeep on hire for transporting illegal poppy husk and the said jeep has been seized and was lying at Police Station, Pander. He has denied the suggestion that he has not kept any driver on the jeep and only in order to save himself he has falsely implicated Radhey Shyam. He further stated that no paper formality regarding keeping Radhey Shyam as the driver of jeep was done.

PW-10 Ramendra Agarwal is the son of the jeep owner. He stated that Radhey Shyam was kept as driver of jeep and he used to take instructions from his father. He identified Radhey Shyam in front of Notary and put his signature 'E' to 'F' on the affidavit (Ex.P/3) as witness.

PW-11 Ram Prasad is the Investigating Officer of this case. He has stated that he took supplementary statement of Ramendra (Ex.P/6). He has also deposed that vide Ex.P/9 he arrested Radhey Shyam, who gave him information i.e. Ex.P/10 and P/11 with regard to verification of site from where the contraband was recovered and the place from where it was loaded. He has also stated that on the information of Bhoja (Ex.P/16) site was got verified. In cross-examination, he has admitted that Ramendra did not tell him that Radhey Shyam has submitted any stamp paper to him. He also admitted in cross-examination that he did not get any information that Firoz Beg remained once the driver of jeep nor he made any investigation about Firoz Beg. He has admitted that a challan in the name of Firoz Beg was found in the jeep but he has not made any investigation. In cross-examination, he has also admitted that there was no eye-witness who had seen Radhey Shyam driving the jeep.

PW-12 Mahesh Singh is the Recovery Officer who was posted as SHO, P.S. Pander at the relevant time. He deposed that on 3.10.2003, he alongwith other police constables, namely, Gopal Lal, Kedar Mal, Ram Kedar and Durga Lal etc.

had gone for conducting 'nakabandi' near 'Kanjar Basti' in the night. He further stated that at 5.00 a.m. a 'commander jeep' No.RJ-06-C-2369 came there, to whom he signalled to stop but the driver of jeep sped away the vehicle, upon which, the jeep was chased. He further deposed that with the aid of light of government jeep, one more person was seen sitting besides the driver. A little later, the said 'commander jeep' was found struck inside dirty water of rain. However, nobody was found inside the jeep. On this, he kept constable-Gopal Lal for guarding the 'commander jeep' and they tried to trace out the accused persons but due to long standing crops on either side, the accused that could not be traced. Upon returning back, the jeep was inspected and nine filled up gunny bags were found inside the jeep. On having suspicion of illegal goods, two persons working in neighbouring fields, namely, Sampat and Ranjeet were asked to act as the motbir witness and their consent were obtained, thereafter the search of jeep was undertaken. During the search of jeep, three gunny bags were found lying on the middle-seat and six on the rear-seat. All the gunny bags were filled with Poppy Straw. For weighing the contraband, constable-Kedar Mal was sent alongwith by government jeep for bringing weights, weighing machine etc.

On the search of rear side of driver seat, original Registration Certificate of jeep in the name of Parmeshwar Saraf R/o. Jahajpur and a release memo dated 10.9.2003 of the Transport Department, Tonk in the name of Firoz driver were found and the same were seized. On weighing, total 186.5 Kg of contraband poppy husk was recovered from nine gunny bags. Out of each gunny bags, sample of 500 Grams each was taken out, sealed and marked as “A-1 to I-1”. The gunny bags were sealed and marked as “A to I". At the spot seizure memo and furd specimen seal memo etc., were prepared. On reaching police station, FIR No.103/03 (Ex.P/24) was registered. The contraband article and with sealed packets of samples were given to the Incharge Malkhana. On the instruction of Circle Officer, Shahpura the investigation was handed over to Ramjilal, C.I., Shahpura. This witness, in his cross-examination, has admitted that at the time of alleged incident he could not identify anyone, so he could not say that whether Firoz was driving the vehicle and he sped away.

PW-13 Suwa Lal is the Secretary of Gram Panchayat. He stated that Bagta, Chhotu and Gopal are the sons of Bheru. He further stated that Bheru expired three years' back.

PW-14 Ashok Kumar is the Patwari. He has stated that on the basis of revenue record Ex.P/19, P/20 and Ex.P/38 that agricultural land exists in the name of Bheru and others. He further stated that perhaps Bheru has expired.

PW-15 Durga Lal is the constable who was the member of raid-party. He has supported the seizure proceedings and stated on the same lines, as has been stated by PW-12 Mahesh Singh. In his cross-examination, this witness has admitted that he did not identify anybody running from the jeep.

PW-16 Kedar Mal. He is also the member of raid-party. He deposed that one more person was sitting besides the jeep driver, which sped away despite giving signal to stop. He stated that after seizure, the contraband material and the samples in sealed condition were deposited with Motilal-Malkhana Incharge. He further stated that he took the sealed samples for depositing them to FSL for analysis and the same were deposited vide receipt (Ex.P/40).

PW-17 Bansi Lal was the SHO at the relevant time. He stated that after completion of investigation, Ram Prasad handed over

challan papers to him and he submitted charge-sheet in the court under Section 8/15 and 8/29 of N.D.P.S. Act.

PW-18 Abhay Singh was posted as constable in the SP Office. He prepared forwarding letter (Ex.P/31) on the basis of the material supplied by Kedar Mal. He further stated that Kedar Mal brought receipt of deposit of goods in FSL vide Ex.P/40.

PW-19 Devkaran is the motbir witness of (Ex.P/17). He stated that he did not know Bhoja @ Heera. Thus, his evidence is of no use. He said that he made thumb impression on Ex.P/17 but he has not seen any arrested person with the police.

PW-20 Ramji Lal stated that he was posted as SHO, P.S. Shahpura on 3.10.2003. The investigation of FIR No.103/03 was firstly with him. He at the instance of SHO, P.S. Pander Mahesh Singh went at the site, prepared site inspection memo (Ex.P/31), recorded the statements of witnesses and during the course of investigation, gave notice under Section 133 of the Motor Vehicles Act (Ex.P/41) to the jeep owner-Parmeshwar Lal. As per the reply to the notice given by the vehicle owner,

during the period from 22.9.03 to 3.10.03 Radhey Shyam was the jeep driver and the jeep was under his custody and it is he who was driving the jeep.

PW-21 Siya Ram is the formal police witness who was sent for verifying the name, parentage and address etc., of accused-Bhoja and Chhotu.

12. During trial, FSL Report (Ex.P/18) was produced by the prosecution and as per the report, opium contents were found in the samples sent for analysis.

13. I have considered the contentions raised by the learned counsel for the appellants and also of the learned Public Prosecutor. Perused the authorities cited by the learned counsel for the appellants. I have also perused the findings of learned trial court and the conclusion drawn thereon.

14. As per the prosecution story, on 3.10.2003 at about 5:00 a.m. during 'nakabandi' police party headed by PW-12 SHO, P.S. Pander Mahesh Singh near “Falasia' they signalled a 'commander jeep' bearing No.RJ-06C-2369 to stop but that

sped away towards Shahpura-Jahajpur road and that was chased and later on, it was found struck in a pool of rainy water having mud. By the time the driver and one more person allegedly sitting in the jeep ran away and they could not be traced inspite of efforts. It is admitted by the prosecution witnesses of raid-party that none of them was identified by them. It is further stated that thereafter in the presence of two independent motbir witnesses, namely, Sampat and Ranjeet were called from the nearby fields and the said jeep was inspected. During inspection of jeep, nine gunny bags filled of poppy straw weighing 186.500 Kgs were recovered from the jeep and out of that, samples of 500 Gram from each bag was collected and sealed with the personal seal of PW-12 Mahesh Singh on the spot. The recovery memo (Ex.P/29) and furd sample seal etc., were prepared. During checking, registration certificate and one release memo pertaining to said jeep were also found. Registration Certificate (Ex.P/5) and release memo (Ex.P/26) were taken in possession vide furd (Ex.P/25). On the basis of recovery of contraband articles, a case under Section 8/15 of N.D.P.S. Act vide report (Ex.P/23) was registered and the chalk report (Ex.P/24) was prepared. During investigation, it is revealed that on the basis of the registration certificate of

the jeep, a notice (Ex.P/41) under Section 133 of the Motor Vehicles Act was given to Parmeshwar Lal (the owner of the jeep) and he in his reply disclosed the name of driver as Radhey Shyam on the relevant date. Ramendra S/o. Parmeshwar-owner of the jeep submitted an affidavit on 9.10.2004 of Radhey Shyam to the Investigating Officer and on that basis, the other accused persons were entangled in this case and they were convicted by the learned trial court.

15. First contention was raised by the learned counsel for the appellants that the recovery and seizure proceedings have not been proved beyond doubt. It is revealed from the seizure proceedings that when the said jeep was inspected, no person was found there and that vehicle was lying unclaimed in a pool of rainy water. It is said that nine filled in gunny bags of poppy straw were found. At that time, two motbir witnesses – Sampat and Ranjeet were kept but both the witnesses have not been produced during trial. The non-production of the independent witnesses leads to a conclusion that they were not supporting the prosecution case. In my opinion, in this particular case where nobody was found in the said jeep and no person was identified by the raid-party, it was more

incumbent upon the prosecution to prove the seizure proceedings by independent motbir witnesses. It was not the case of the prosecution that the independent motbir witnesses were not available but two motbir witnesses have been kept at the time of seizure proceeding. Thus, only the evidence of police officials remain. The members of the raid-party i.e. PW-4 Gopal Lal, PW-15 Durga Lal and PW-16 Kedar Mal were of the same police station and they were working under the PW-12 Mahesh Singh. Thus, by non-production of the named motbir witnesses in court, the prosecution story in regard to seizure proceeding remains under doubt. In recent case of Raju Munim Vs. State (supra) reported in 2006(2) RLW 1452, it was held that in the absence of independent witnesses, the recovery of contraband was not found free from doubt and the accused-appellant was held entitled to get the benefit of doubt. In the case of **Jagdish Vs. State of M.P.** reported in (2003) 9 SCC 159 where recovery proceedings was not supported by independent witnesses, the prosecution story was not held reliable and benefit was given to appellant. The finding of the learned trial court in this respect is not correct. The seizure proceeding is required to be proved by strong and reliable evidence beyond doubts. Contentions were also raised by the

appellants with regard to the other laches and infirmity in sealing and tampering of samples It is revealed from the evidence that at the time of seizure proceedings, the personal seal of PW-12 was used and that seal remained with PW-12. As per statement of PW-3 Moti Lal, contraband article and samples were not re-sealed at the time of its deposit in the Malkhana. PW-3 Moti Lal further stated that the 'Furd Sample Seal' was not handed over to him at that time. As per Section 55 of N.D.P.S. Act, re-sealing was necessary at the time of depositing in 'Malkhana' to prove that the sample remained intact. It is further not proved by corroborating evidence that the samples remained intact and in the self-same condition till they were deposited in FSL, as the independent witnesses of recovery have not been produced. The 'Furd Sample Seal' was not deposited in the Malkhana and the samples were not re-sealed by the Incharge Malkhana, therefore, the accused persons have been prejudiced. These provisions are not mandatory in nature but they cannot be ignored. Thus, the samples remained intact and in the self-same condition till they were deposited in FSL is not found proved beyond doubt by strong and reliable evidence.

16. From the perusal of evidence, as stated above and the material available on record recovery of poppy straw was made from unclaimed jeep. Thus, it is made clear that there is no direct evidence of recovery against the accused persons. The owner of vehicle stated in his reply to the notice that Radhey Shyam was the driver of jeep, but he has not furnished any documentary evidence with regard to his appointment and salary that Radhey Shyam was the driver of the jeep on 3.10.2003. On the basis of reply, the Investigating Officer proceeded with the investigation but he has not made independent investigation in this respect despite the fact that a release memo (Ex.P/26) in the name of Firoz Beg of nearby date of 10.9.2003 was collected from the jeep was in the investigation file. In my opinion, the Investigating Officer should have done independent investigation to reach a definite conclusion. As per the record, name of Radhey Shyam was disclosed by PW-9 Parmender on notice (Ex.P/41) dated 16.11.2003 but he was arrested on 6.10.2004. Thus, the Investigating Officer was not satisfied with the reply but later on his arrest was made. The delay has not been explained by the Investigating Officer. It is also revealed from the record that the said release memo dated 10.9.2003 of the jeep in the

name of Firoz Beg driver was also found during recovery proceedings on 3.10.2003 but no investigation was made with reference to Firoz Beg. PW-11 Ram Prasad the Investigating Officer has stated that nobody informed him with regard to Firoz Beg but his reply is against the record as the release memo in his name was with him in the file. He admitted in his statement that he did not make any investigation in this respect. In cross-examination he further admitted that there was no direct evidence of driving of the said jeep by Radhey Shyam. The evidence of PW-9 Parmeshwar Lal is not trustworthy. In my opinion, looking to the seriousness of the charges, it was the duty of the Investigating Officer to find out that in fact Radhey Shyam was having control over the vehicle at the time of incident and was having conscious possession of contraband articles. The finding of the learned lower court is not correct to this extent. The prosecution has also relied on the evidence of the information given by appellant-Radhey Shyam Ex.P/10 and Ex.P/11 on 6.10.2004 under Section 27 of Evidence Act for verification of sites after a lapse of about one year from the date of incident. It is revealed from the record that the police was already having knowledge of the site from where the contraband was recovered from the jeep. Secondly

with regard to information of verification of house of Chhotu, both the motbir witnesses in that respect PW-1 Gopal and PW-2 Sharwan have turned hostile and they have not supported the prosecution story. Thus, on the basis of these information, no conclusion can be drawn against Radhey Shaym or any other accused persons.

17. The prosecution has much relied on the affidavit (Ex.P/3) in support of its story. As per the prosecution witnesses, affidavit (Ex.P/3) is on a stamp-paper of Rs.20/-, which was purchased by Radhey Shyam from PW-8 Keshar Lal-Stamp Vendor for the purpose of marriage on 29.9.2003 (prior to the date of incident). PW-8 Keshar Lal the Stamp Vendor has stated that at the time of taking stamp, PW-9 Parmeshwar Lal was also accompanied with Radhey Shyam. The said affidavit was drafted by PW-7 Shashikant, Advocate who was tenant of Parmeshwar Lal. On 3.10.2003 at evening time i.e. after the recovery of contraband. Again it was got attested by Shashikant and Ramendra-son of Parmeshwar Lal by Notary in the evening, where Radhey Shyam was identified by Ramendra. The said affidavit was prepared on 3.10.2003 but for the first time it was submitted by Ramendra to the

Investigating Officer on 9.10.2004. The said affidavit (Ex.P/3) was not presented by Radhey Shyam himself. Ramendra has not stated at anything for non-production of the affidavit earlier. PW-9 Parmeshwar Lal has admitted in his statement that he was detained by the police. Thus, from the aforesaid discussion, it can clearly be inferred that the affidavit (Ex.P/3) was prepared by Shashikant and Ramendra and got signed by Radhey Shyam under pressure to save his father. The evidence of these witnesses are not creditable and no definite conclusion can be based on their testimonies. Therefore the affidavit (Ex.P/3) inspires no confidence and that cannot be taken as a reliable document.

18. In this respect, one more thing is to be appreciated that on behalf of prosecution, the learned Special Public Prosecutor filed an application before the learned trial court on 26.7.2005 under Section 8/25 of N.D.P.S. Act and under Section 319 Cr. P.C. for impleading Parmeshwar Lal as an accused in this case and in that application, the learned Special Public Prosecutor stated that the affidavit (Ex.P/3) of Radhey Shyam is bogus and it has been got prepared by

Ramendra to save his father. The relevant portion of the application dated 26.7.2005 is quoted as under :-

> " 3- यह कि वहान स्वामी ने एक दस्तावेज प्रदर्श पी. 3 पेश किया जो कि (sic) शपथ पत्र भी दिनांक 3.10.03 को घटना के करीब 10 घण्टे बाद तैयार किया हुआ है।
> 4- यह कि उक्त शपथ पत्र वहान स्वामी के लड़के श्री रामेन्द्र सर्राफ द्वारा अपने पिता को बचाने के लिए फर्जी तैयार किया हुआ है।"

Thus, the prosecution itself has not relied on the affidavit (Ex.P/3) and has stated that it was prepared bogus by Remendra, as contended by the accused-appellants. During the course of arguments, it has not been denied by the learned Public Prosecutor that this application was not filed by Special Public Prosecutor before the trial court. No explanation was submitted, this stand again makes the prosecution story doubtful but the learned trial court has not properly appreciated this aspect of the case, therefore, the base of finding of learned lower court on Ex.P/3 is not sustainable.

19. I have also considered the contentions raised by the appellants that the affidavit (Ex.P/3) cannot be read as extra judicial confession of Radhey Shyam. In the affidavit (Ex.P/3), it is alleged that Radhey Shyam has stated that he was the driver of the said jeep and on the relevant date Ladhu and Bhoja were with him in the vehicle and they got loaded the gunny bags but in the affidavit, he has also stated that he was ignorant about the material filled in the bags and he himself has claimed to be innocent and is throwing the responsibility of contraband on the others, such a statement, cannot be used against co-accused. Thus, it is not extra judicial confession. In the affidavit (Ex.P/3), he has stated that two more persons were sitting with him but as per the versions of PW-12 Mahesh Singh and the other members of raid-party, only one person was seen sitting besides the driver. Thus, factually this affidavit is against the testimonies of the eye-witnesses. For ready reference, the relevant portion of the affidavit (Ex.P/3) is quoted under :-

> "4- मैं शपथ पूर्वक कथन करता हूं कि लादू भाट से बात कर मैं जीप लेकर भगुनगर का झौपड़ा चला गया। मैंने इस बाबत रात्रि को श्री परमेश्वर जी या अन्य परिजनों को कोई जानकारी किराये जाने बाबत नहीं दी। मैं

बिना जानकारी दिये ही गया था। भगुनगर से कच्चे रास्ते होकर नौ बोरियां लेकर भीलडी जा रहा था कि रास्ते में ढगरिया के पास थाना पण्डेर के गश्ती दल ने गाडी रूकवा दी। मेरे साथ के दोनों व्यक्ति लादू व भोजा भाग निकले जिस पर मैं भी उतर कर भाग गया। बाद मे पता चला कि उन बोरियों में डोडा चूरा था।

उपरोक्त गाडी को इस कार्य मे ले जाने में श्री परमेश्वर जी सर्राफ का किसी प्रकार का कोई योगदान या सहमति नहीं थी एवं न ही उपरोक्त डोडा चूरा बाबत उन्हें या मुझे कोई जानकारी थी।"

20. As discussed above, the affidavit (Ex.P/3) was procured by PW-10 Remendra to save his father. At the time of purchase of stamp, Parmeshwar Lal upto attestation made by the Notary, Ramendra his son remained with Radhey Shyam. Radhey Shyam has denied from the averment made in the affidavit and stated that his signatures were obtained under pressure. Therefore, it cannot be believed that this affidavit was made voluntarily and admitted it was produced by Ramendra at a belated stage but has not stated in his previous statement. It was not produced by Radhey Shyam. No detailed investigation was done in this respect and as discussed above,

it cannot be termed as a extra judicial confession. In the case of **Ram Niwas (supra)**, it was held that extra judicial confession is a weak type of evidence, which alone cannot form basis of conviction unless get corroboration. In the case of **Maharaj Deen (supra)** it was held that where a co-accused is stating that another person has committed murder, it is would not be extra judicial confession at all. In the case of **Balkrishna Naik (supra)**, it was held that where accused himself pleaded innocence and is throwing blame on co-accused, such statement cannot be used against the co-accused. In the case of **Balbir Singh (supra),** it was held that confession of co-accused cannot be treated as substantive evidence and in the case of **Shivappa (supra),** it was held that confession of accused under Section 164 Cr. P.C. cannot be acted upon unless court satisfies that it is voluntary in nature.

21. Thus, the contentions of the learned counsel of the appellants in this respect are having force and in my opinion Ex.P/3 could not be treated as extra-judicial confession and no conclusion could have been based upon it. The evidence of PW-9 Parmeshwar Lal and his son PW-10 Ramendra is not trustworthy. The learned trial court has much relied on Ex.P/3

and taking as extra judicial confession by Radhey Shyam and based the responsibility of accused-appellants but in my opinion the finding is not correct and suffers from illegality and infirmity and thus is liable to be quashed and set aside. The recovery of contraband articles is not proved by independent motbir witnesses and link evidence has not properly been proved. Thus, the prosecution story is not found proved beyond doubt and the accused are entitled to get benefit of it.

22. In the light of the aforesaid discussions, now we examine the position of each accused-appellant in the commission of crime. As far as accused-appellant **Chhotu** is concerned, his name has not been mentioned in the extra judicial confession. The prosecution has not produced any witness in this respect that the alleged contraband articles were loaded in his presence. The prosecution has produced PW-14 Ashok Kumar-Patwari and PW-13 Suva Lal-Gram Sachiv has stated that Chhotu is having two brothers. Father of Chhotu has expired. Thus, on the basis of these evidence exclusive possession over the field as well as over the house cannot be inferred. In case of **Raya (supra)**, it was held that where land was recorded in the names of four tenants, until

partition is not proved, exclusive possession of one tenant cannot be established. In the case of **Hanuman Das (supra)**, it was held that where no independent witness from vicinity of the house in-question got examined by prosecution to show that the room from where recovery was effected, was in exclusive possession of appellant. No inference of exclusive possession can be drawn. No other recovery is made of any contraband article from his house, therefore, it cannot be believed that the alleged contraband articles were loaded from the house of Chhotu. The house of Chhotu is said to be verified by accused-Radhey Shyam on his information but the motbir witnesses PW-1 Gopal and PW-2 Sharwan are not supporting the same. The house was again verified by other accused-Bhoja but the said site was already within the knowledge of the Investigating Officer. Thus, these evidence do not support the prosecution. Therefore, against Chhotu the charge of offence under Sections 8/15 or 8/29 N.D.P.S. Act is not proved and he is entitled to be acquitted. The position of **Ladhu and Bhoja** is the same. The main allegation against them is that they were in jeep as per the extra judicial confession (Ex.P/3). Firstly both has not been identified by PW-12 Mahesh Singh or any member of the raid-party.

More so, as per their versions, one person besides driver was seen in jeep and that too was not identified but later on two persons were named to be in jeep without any reliable additional evidence. Thus, their presence is not proved nor their custody and possession over the contraband articles is proved. As per the aforesaid discussion that Ex.P/3 cannot be taken as an extra judicial confession, except this, there is no other incriminating evidence against them to held them guilty. The information made by Bhoja with regard to Chhotu's house is of no use, as discussed above. No recovery of contraband article was made from their possession and the said contraband articles has not been found established in their control or custody. In the case of **Avtar Singh (supra),** it was held that custody and control over the goods of accused must be proved. In this case, contraband articles were lying in the vehicle - possession of accused were not held proved and accused were acquitted. The relevant portion of the citation Avtar Singh (supra) reads as under :-

> “Possession is the core ingredient to be established before the accused in the instant case are subjected to punishment under Section 15.”

The recovery is not proved by independent witnesses and other information were also not found proved. On the basis of aforesaid conclusions, the case under Section 8/15 is not found proved beyond doubts and they are entitled to be acquitted. The position of **Radhey Shayam** is also considered deeply. He was not found at the time of recovery of contraband articles and nobody has identified himself as the driver of the jeep at the relevant time. It has not been found proved that at the relevant time he was having control and conscious possession of the contraband articles beyond doubt.In the case of **Surja Ram (supra)** in that case 32 bags of poppy husk was recovered from trolley which was lying on public place. Owner of the trolley was another person. It was held that the prosecution has failed to prove that recovery was made from the possession of accused-appellant. In the case of **Jai Ram (supra)**, it was held where recovery was made from open place, exclusive possession of accused cannot be construed and the finding of guilt was not justified. In Ex.P/3 he has not confessed the guilt and claimed to be innocent this was not produced by him and Ex.P/3 was not found to be made voluntarily and thus was not a reliable document. No other

incriminating evidence against him. The possession or custody of alleged contraband is not found proved of Radhey Shyam. No independent witness of recovery was produced. Thus, the prosecution has not been able to prove the case beyond doubt against him. The charge under Section 8/15 of N.D.P.S. Act is not proved and he also deserves to be acquitted.

In the result, the appeals filed by accused Chhotu, Radhey Shyam, Ladu Lal and Bhoja @ Heera are allowed. The judgment under appeal is set aside. The appellants are acquitted of the charges levelled against them. The appellants-Chhotu and Radhey Shyam are already on bail, their bail-bonds stand discharged. Appellant-Ladu Lal and Bhoja @ Heera are in jail. They shall be released forthwith, if not required in any other case.

(MANAK MOHTA), J.

Sanjay/-